Supreme Court, U.S.
FILED
JUN 7 1999
CLERK

No. 98-1794

IN THE

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351,

Petitioner,

v.

COOPER NATURAL RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERQUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly held that an arbitrator fundamentally erred when he utterly ignored a bargained for compromise agreement between the employer and the grievant's union that settled the underlying grievance.

2. Whether the Fifth Circuit properly held (as an alternate ground for its decision) that an arbitrator fundamentally erred when he determined a grievant had no notice of his employer's drug policy, even though that policy constituted an unambiguous and express CBA provision.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, Cooper Natural Resources, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The International Union of Operating Engineers ("Union") requests this Court to review a Fifth Circuit decision that plows no new ground. Rather, that decision applied settled law to vacate a profoundly flawed arbitration decision. (That decision had revoked minor discipline imposed on an employee after he had tested positive for barbiturates). In fact, the Fifth Circuit correctly vacated that flawed decision on two independent grounds. Each ground rested on the unremarkable conclusion that the arbitrator in effect invalidated a bargained for contract term. Consequently, Union's questions warrant no further review.

COUNTERSTATEMENT OF THE CASE

A. The Parties Bargained Over The Drug Policy And Agreed To Include It In The CBA.

Respondent Cooper Natural Resources, Inc. ("Cooper") produces sodium sulfate at its facility in Seagraves, Texas. (R. 204; App. 2). Safety is a major concern at that facility. (*Id.*).

Over the years, Cooper and Union have bargained for a number of safety-related terms and conditions of employment. In 1989, they bargained for an especially critical safety measure — an alcohol and drug policy (hereinafter the "Drug Policy"). (R. 204; App. 3). That Drug Policy was not a mere work rule, however. Rather, it became an explicit part of the parties' collective bargaining agreement ("CBA"). Since about 1989, therefore, Cooper has regularly drug-tested its employees, including bargaining unit members. (R. 205; App. 16).

In bargaining for subsequent CBAs, the parties agreed to maintain the Drug Policy in the CBA. (R. 205; App. 3). For example, the parties' May 1993 CBA included the Drug Policy. (R. 205, R. 231; App. 2-3).

The May 1993 CBA in fact contained several provisions related to the Drug Policy. First, Article 29 of the CBA provided that Cooper's "Drug Policy modified May 1992 is incorporated herein as a part of this Agreement and shall apply in all respects to employees and applicants for employment." (R. 231). In turn, the Drug Policy expressly provided for drug testing of employees in conjunction with a routine physical examination. (R. 242 and R.E. Tab 7; App. 3). The Drug Policy also provided that employees who tested positive would be subject to discipline, including discharge. (R. 243 and R. 245; App. 3).

Besides expressly incorporating the Drug Policy, the 1993 CBA also contained further provisions regarding Cooper's right to conduct drug tests and to discipline employees based on those tests. Thus, Article 29 of the CBA separately added that Cooper could require employees to take a drug screen. (R. 231; App. 16). Further, Article 28 provided that "if a physical examination, including a drug screen test, should disclose that an employee's condition may be detrimental to the employee or others in the plant, [Cooper] reserves the right to make such adjustments in the employee's status as are found necessary to correct the situation." (R. 230; App. 3).

Accordingly, the CBA provided two sources for Cooper's explicit right to do two things: conduct drug tests and then to issue discipline based on that testing. The Drug Policy itself gave Cooper those express rights and that Drug

Policy was expressly incorporated in the CBA. Second, Articles 28 and 29 of the CBA separately provided for the same rights. In neither the CBA nor Drug Policy were the bargained for rights conditioned in any way.[1]

Union submitted the May 1993 CBA to its members for ratification. (R. 9, R. 64, and R. 205; App. 16). The Union members ratified the CBA (R. 9, R. 64, and R. 205; App. 16).

B. Gates Admittedly Took Barbiturates That Were Not Prescribed for Him.

One of the Union members at the time of ratification was Elvin Gates ("Gates"). Gates occupied the job of chiller operator at the Cooper plant. (R. 205; App. 3). That job encompassed the operation of a mechanical refrigeration system charged with anhydrous ammonia, a hazardous substance. (R. 205; App. 3).

On April 9, 1996, Gates submitted to an annual physical. (R. 205; App. 17). Pursuant to past practice, the 1993 CBA, and the Drug Policy, his physical included a drug screen. (R. 205; App. 17). Prior to the drug screen, Gates signed a consent form authorizing collection of a urine specimen for purposes of the drug screen. (R. 206 and R. 248; App. 3).

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1. In its Petition to this Court, Union dwells at length on a minor provision of the Drug Policy that required Cooper to "develop information and communications" about the Drug Policy. (Pet. Brief at p. 5). This provision in no fashion attempted to condition Cooper's contractual right to drug test employees or to discharge employees who tested positive.

As a result of Gates' drug screen, Cooper learned that Gates had tested positive for barbiturates, a controlled substance. (R. 206; App. 17). Cooper investigated. Although Gates initially denied taking any form of barbiturates or any prescribed medications, he later changed his story. He subsequently related to Cooper that he supposedly had taken some of his wife's medications. (R. 206; App. 17). Cooper concluded Gates had seriously breached the Drug Policy and so initially decided to discharge him. (R. 206; App. 4).

C. The Union Intervened, Struck a Compromise Bargain with Cooper, and Signed a Written Agreement Memorializing the Compromise.

After Cooper decided to discharge Gates, the Union intervened on his behalf. (R. 206; App. 4). As a result of the intervention, Cooper, Union, and Gates all agreed through bargaining to modify the quantum of Gates' discipline. (R. 206; App. 4).[2] Instead of discharge, the parties agreed to several matters that were all memorialized in a written agreement (colloquially known as and hereinafter referred to as the "Last Chance Agreement" or "LCA"). Cooper, Union, and Gates signed the Last Chance Agreement on April 26, 1996. (App. 37-39). Under the LCA, (1) Gates was reinstated but he lost the pay for the time he missed from work after his drug test and before the LCA

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2. In its brief to this Court, Union has egregiously mischaracterized the record regarding this issue. Union maintains in several places that Cooper told Gates "sign the Last Chance Agreement or be fired." (Pet. Brief at pp. 3, 12, and 15). This unequivocally is a gross mischaracterization because (1) the arbitrator did not so find or hold; (2) based on the record that issue was not even addressed at the arbitration; and (3) no other summary judgment evidence even alludes to this possibility.

was signed; (2) Gates warranted that he would abstain from any drugs prohibited by the Drug Policy; and (3) Gates agreed to submit to regular and random drug testing for a period of no less than 12 months. (*Id.*)

In accordance with the LCA, Cooper rescinded Gates' termination and returned him to work. (R. 206; App. 18). However, after having reached a bargain with Cooper, Union turned around on May 9, 1996, and grieved the very issue the parties settled in the LCA. (R. 207; App. 4 - 5). In its grievance, Union requested that the LCA, which it had just signed, be "torn up" and that Gates recover his pay for the period he did not work after the drug test. (R. 207; App. 18). Cooper denied the grievance citing its rights under the Drug Policy, the CBA, and the LCA. (R. 253). The parties then submitted the grievance to arbitration pursuant to the CBA. (R. 223; App. 5).

D. The Manifestly Flawed Arbitration Decision

Under the CBA, the parties had agreed that the arbitrator's sole function was to determine whether Cooper or Union was correct with reference to the proper application and interpretation of the CBA. (R. 228; App. 5). The CBA expressly decreed that the arbitrator had no authority to change, amend, modify, or supplement the CBA in any respect. (R. 228; App. 5).

However, the arbitrator who heard Union's grievance entirely abrogated not one but two of the parties' collectively bargained terms. The arbitration was conducted on June 13, 1997, by arbitrator Barnett M. Goodstein. (R. 207). At the proceeding's inception, the parties submitted joint exhibits to the arbitrator. Those exhibits included the 1993 CBA, the Drug Policy, and the LCA. (R. 207).

During opening statements, a Union business agent conceded that Gates took barbiturates that were not prescribed to him and that he therefore tested positive on a drug screen. (R. 207; App. 5). The business agent and Union did not contend that under these facts, the Drug Policy did not apply. Nor did Union attack the validity of the LCA. Rather, Union solely contended that Gates supposedly lacked notice of the Drug Policy and so therefore could not be expected to adhere to it. (R. 207; App. 5). Union contended this even though Union had negotiated the Drug Policy into the CBA and even though Union members had ratified the CBA. (R. 9, R. 64, and R. 205; App. 3).

Cooper then tried to put on its case-in-chief. Before it was permitted to do so, the arbitrator expressly told Cooper's representatives that Cooper had to prove that Gates "knew or should have known of [Cooper's] drug policy. . . ." (App. 31). Consequently, Cooper introduced two memos that demonstrated that in 1989 and 1992, all employees were given a copy of the Drug Policy. (R. 207, R. 255, and R. 257; App. 18). At the end of Cooper's case-in-chief, the arbitrator informed Union it did not need to put on its case-in-chief because, according to the arbitrator, Cooper had failed to show that Gates had notice of the Drug Policy. (R. 208; App. 34).

Three days after the hearing, the arbitrator issued his written opinion. (App. 25 *et seq.*). In that opinion, the arbitrator determined the following facts:

- Cooper had its Drug Policy in effect for many years (App. 26);

- That Drug Policy provided that if an employee tested positive on a drug screen, the employee would be subject to discipline, including discharge (App. 26);

- The Drug Policy was expressly incorporated by reference into the CBA (App. 32);

- The Drug Policy had been posted on the plant's bulletin board (App. 33);

- Each year before annual physicals, employees were warned that the physicals included drug screens and that if they tested positive "they are in serious trouble with Cooper." (App. 26);

- In safety meetings, the requirements of a drug free workplace have been discussed (App. 33);

- In May 1992, Cooper disseminated a memo to employees expressing the importance of a drug free workplace and which included a copy of the Drug Policy (however, the arbitrator declined to give much weight to this evidence because at the hearing Cooper had failed to physically attach the Drug Policy — which was a joint exhibit — to the May 1992 memo) (App. 31); and

- Gates tested positive for barbiturates in 1996 (App. 26).

After finding these facts, the arbitrator's opinion dwelled entirely on the issue of whether Gates did or did not have notice of the Drug Policy. (App. 30-35). Nowhere

in his opinion did the arbitrator discuss the validity or even relevance of the LCA. Nowhere in his opinion did the arbitrator discuss or even refer to the binding nature of the drug testing provisions of the CBA. As seen below, these were fundamental and fatal flaws. The arbitrator did not merely misinterpret a contract provision but in effect abrogated two entire contractual provisions.

E. The District and Appellate Court Both Properly Found that the Arbitrator had Committed Fundamental Error.

Cooper appealed the arbitrator's patently flawed decision. The District Court held that the arbitrator violated his duty to apply the CBA and separately, his duty to apply the LCA. (App. 13-21). The Fifth Circuit affirmed on both these independent grounds. (App. 1-12).

REASONS FOR DENYING THE WRIT

The Fifth Circuit's opinion does not conflict with any decision of this Court or any other court of appeals.[3] Indeed, the Fifth Circuit's decision rested on two separate and independent grounds both of which correctly applied settled law. Review by this Court is therefore unnecessary.

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3. Union does not even contend in its brief that the Fifth Circuit's opinion conflicts with any decision of any other court of appeals.

I.

IN HOLDING THAT THE ARBITRATOR IMPERMISSIBLY IGNORED THE LAST CHANCE AGREEMENT, THE FIFTH CIRCUIT JOINED ALL OTHER CIRCUITS TO HAVE CONSIDERED THE MATTER.

In one of its grounds affirming summary judgment, the Fifth Circuit held that the arbitrator improperly failed to apply the LCA. (App. 8-12). In so holding, the Fifth Circuit joined every other court of appeals to have considered the issue.

The Fifth Circuit's holding rests on a fundamental and settled doctrine: last chance agreements entered into between employers and unions are binding as much or even more than CBAs. Because they are binding as labor contracts, an arbitrator owes as much or even more deference to LCAs as he does to CBAs. As the Fifth Circuit recognized, the arbitrator here completely lost sight of this profound rule.

This rule has been applied in several circuits, including the Sixth Circuit. *See Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350 (6th Cir. 1984). That case fully explored the principles animating the court's holding that last chance agreements cannot be disregarded by arbitrators. The court began its analysis by citing the oft-cited labor law principle favoring the finality of arbitration decisions. *Id.* at 353. The court, however, looked beyond this simple phrase and noted that:

> It is not arbitration per se that fundamental policy favors, but rather final adjudication of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, fundamental labor policy encourages that procedure no less than arbitration.

Id. citing *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3rd Cir. 1977).

The Sixth Circuit then determined that grievance settlement agreements reflect just such an alternative means of resolving grievances. *Id.* at 354-55. Because this is so, the parties to such agreements "have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Id.* at 354. Accordingly, arbitrators must enforce such agreements as the parties' chosen means of settling their disputes. *Id.* at 354-55.

As noted by the Fifth Circuit, all other circuits to have considered this matter have followed the Sixth Circuit's lead. *See, e.g., Tootsie Roll Indus., Inc. v. Local Union No. 1*, 832 F.2d 82, 82 (7th Cir. 1987); *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local No. 688*, 959 F.2d 1438, 1439 (8th Cir.), *cert. denied,* 506 U.S. 1013 (1992).

In its Petition to this Court, Union not surprisingly declined to mount a direct attack on this settled law. Rather, Union relies both on a mischaracterization of the record and a vain attempt to distinguish the case law. Thus, Union contends (without any record support) that "Gates was

required to sign and LCA as a condition of continued employment and he asked the arbitrator to determine whether Cooper was justified in requiring him to do so." (Pet. Brief at p. 12).

Presumably, Union means that the LCA was extracted only through duress and coercion. However, the arbitrator never considered such an issue; nor was it argued to him at any point by Union. Nor is there any summary judgment evidence in any form indicating that the LCA resulted from duress or coercion. Consequently, Union's contention is contrived and misleading.

In a confusing argument, Union also appears to argue that an arbitrator has the authority to determine whether a last chance agreement is binding. (Pet. Brief at pp. 13-14). If Union is contending that an arbitrator can determine the factual issue of whether a last chance agreement was reached through duress or coercion, Union's contention is unremarkable. However, as seen above, the arbitrator did not find or even address this issue. Nor is there any evidence to suggest it. Accordingly, Union's contention again misses the mark.

The same can be said for Union's further contention that the Fifth Circuit's holding somehow condoned an implied "waiver of the right to appeal." (Pet. Brief at pp. 14-16). Presumably, Union is contending that because LCAs are binding on the parties and the arbitrator, LCAs foreclose the underlying grievance from meaningful review by the arbitrator. If this is Union's argument, it demonstratively fails. First, neither the Fifth Circuit nor any other circuit has held or inferred that last chance agreements operate as a "waiver of the right to appeal." Second, this

scenario in no fashion entails a forfeiture of Union's right to arbitrate whether the LCA was reached through duress or coercion, or to arbitrate any ambiguous terms of the LCA, or to arbitrate whether the parties correctly carried out the terms of the LCA. However, in the absence of these issues, an arbitrator cannot overturn the parties' chosen means of resolving their dispute.

In essence, Union is contending it was proper for the arbitrator to *sub silentio* strike the LCA because it did not accord with his view of industrial justice. Union invites this Court to approve this machination. However, this is exactly what this Court has said violates an arbitrator's fundamental duty. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 591, 597 (1960) (an arbitrator "does not sit to dispense his own brand of industrial justice").

Union's arguments and not the Fifth Circuit's opinion are therefore contrary to this Court's precedents. For this reason alone, the Fifth Circuit's opinion does not warrant review by this Court.

II.

IN HOLDING THAT THE ARBITRATOR INCONGRUENTLY FOUND THAT GATES LACKED NOTICE OF THE DRUG POLICY, A CBA TERM, THE FIFTH CIRCUIT CORRECTLY APPLIED SETTLED LAW.

In another ground affirming summary judgment for Cooper, the Fifth Circuit held that the arbitrator committed fundamental error by finding that Gates lacked notice of a CBA term that Union negotiated and Union members

ratified. (App. 7). The Fifth Circuit correctly applied settled law to reach this conclusion. Union's attempts to argue to the contrary are unavailing.

As the Fifth Circuit properly recognized, the arbitrator's opinion contains a fatal internal contradiction. On the one hand, the arbitrator's entire opinion rested solely on one ground — that Gates supposedly lacked notice of the Drug Policy. (App. 31-35). However, relying on that ground caused the arbitrator to disregard and abrogate the very CBA he was duty bound to interpret. That is, the Drug Policy was indisputably part of the CBA. It did not exist separate and apart from it. It was not a mere work rule.[4]

As part of the CBA, the Drug Policy consequently constituted a term of employment collectively bargained by Cooper and Union. When Union agreed to the Drug Policy, it necessarily bound all bargaining unit employees to its terms. *See Cary v. Teamsters Local 95*, 150 L.R.R.M. (BNA) 3018, 3021 (E.D. Va. 1993), *affirmed*, 23 F.3d 400 (4th Cir. 1994) (drug testing provisions of a bargaining agreement were binding on all members of the bargaining unit including union non-members). Accordingly, once Union agreed to the Drug Policy as a CBA term, it automatically made that policy binding on all the bargaining unit employees whether they knew of the policy or not.

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4. Indeed, even though the Drug Policy was incorporated by reference into the CBA, the CBA also independently contained other explicit references to Cooper's right to drug test (Art. 29 of the CBA) and its right to discipline based on the drug test results (Art. 28 of the CBA). In fact, this latter provision expressly allowed Cooper in its discretion to make any "adjustments in the employee's status" if a drug test disclosed an employee's condition could have been detrimental to the employee or others. (R. 230; App. 3).

Thus, the arbitrator's critical mistake was importing a lack of notice theory — which can be relevant to the question whether an employer had just cause to discipline for violating *non-CBA* work rules — into the context of a violation of an explicit CBA term. Because CBA terms are automatically binding on employees, an employee's specific knowledge of the CBA terms is irrelevant. In other words, just cause analysis is wholly inapposite in this context.

This principle has been applied in an analogous context. For example, it is well settled that if a CBA explicitly describes a disciplinary penalty for specific conduct, an arbitrator cannot substitute his own penalty once he finds the employee committed the specific conduct. *See, e.g.*, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local No. 2713*, 103 F.3d 449, 452 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997) ("once the arbitrator found that [the employee] fabricated her story, he was bound to impose the penalty provided by the CBA for that conduct"); *S.D. Warren Co. v. United Paper Workers' Int'l*, 845 F.2d 3, 8 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988) (because the employer and union had negotiated and incorporated into the collective bargaining agreement disciplinary rules and penalties for violation of those rules, "[n]othing is left to the arbitrator's judgment except determining whether the rules are violated"). These cases therefore stand for the proposition that an arbitrator cannot seize on a just cause analysis as "the loophole through which the arbitrator bypasses" mandatory contract language. *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union, Local 3-372*, 76 F.3d 606, 610 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996).

In this case, the arbitrator similarly contrived to find a "loophole." By grasping at the "no notice" theory, he effectively read the Drug Policy completely out of the parties' CBA. The Fifth Circuit properly concluded this was fundamental error.

In its brief to this Court, Union has attempted to obscure this simple holding. The thrust of Union's argument is that the Fifth Circuit overturned the arbitrator's factual findings. (Pet. Brief at pp. 8-11 and 17-21). Union goes so far as to argue that certain alleged comments by the court about the arbitrator's factual findings "infect[ed] every aspect of the Court's reasoning." (Pet. Brief at p. 9). This contention is a gross mischaracterization. In fact, after proffering this sweeping claim, Union supports this contention by citing to peripheral comments by the Fifth Circuit buried in two footnotes. (Pet. Brief at pp. 9-10). However, these isolated comments cannot obscure the Fifth Circuit's clear holding that the arbitrator impermissibly used a "loophole" to abrogate a clear CBA term. Consequently, Union's contention that the Fifth Circuit's opinion is "infected" with improper comments on fact finding is a canard.

In its remaining argument to this Court, Union contends that an obscure provision of the Drug Policy may have created a "condition precedent" to enforcement of the Drug Policy and that the arbitrator supposedly so found. (Pet. Brief at pp. 19-20). This contention again is a diversion.

Union (as the arbitrator) is still confusing apples and oranges. The CBA contained *two* sources[5] for Cooper's right

5. As seen above, these two sources are : (1) the Drug Policy, which was incorporated by reference into the CBA; and (2) Articles 28 and 29 of the CBA.

to do *two* things: drug test and then discipline for positive drug test results. Here, Cooper drug tested Gates and then disciplined him for testing positive. The CBA in two ways gave Cooper the unambiguous contractual right to do so. That the Drug Policy (one of the two sources of that right) contained one minor provision that Cooper should inform its employees about the Drug Policy cannot and does not create a "condition precedent" in any sense. Consequently, if the arbitrator in fact relied upon this reasoning[6], his grave error still stands. An arbitrator simply cannot "interpret" entire unambiguous CBA terms completely out of the CBA. Because this is exactly what the arbitrator did here, as the Fifth Circuit properly held, the Court need not review that court's opinion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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6. It is wholly unclear from his opinion whether the arbitrator in fact ever relied on this reasoning. The arbitrator's opinion certainly does not mention anything about a "condition precedent." Rather, his opinion follows the usual just cause "no notice" reasoning that, as seen above, led the arbitrator profoundly astray.